

1 ENVIRONMENTAL AND PUBLIC PROTECTION CABINET

2 DEPARTMENT OF LABOR

3 OFFICE OF WORKERS' CLAIMS

4 (Amendment)

5 803 KAR 25:009. Procedure for adjustment of coal workers'

6 pneumoconiosis claims.

7 RELATES TO: KRS 342.260, 342.316, 342.732, 342.792, 342.794,

8 342.796

9 STATUTORY AUTHORITY: KRS 342.260(1), 342.316(3)(a), 342.732(5),

10 342.792

11 NECESSITY, FUNCTION, AND CONFORMITY: KRS 342.260(1) requires

12 the Executive Director [~~commissioner~~] to promulgate administrative regulations

13 necessary to implement the provisions of KRS Chapter 342. KRS 342.316(3)(a)

14 requires the Executive Director [~~commissioner~~] to prescribe the format of the

15 medical report required for claim resolution. KRS 342.732(5) requires the

16 Executive Director [~~commissioner~~] to promulgate an administrative regulation

17 relating to retraining incentive benefits for coal workers' pneumoconiosis. KRS

18 342.720(3) requires that the Executive Director [~~commissioner~~] promulgate an

19 administrative regulation to establish procedures for the resolution of claims. This

20 administrative regulation establishes the requirements and procedure for

21 adjustment of coal workers' pneumoconiosis claims.

Section 1. Definitions. (1) "ALOSH" means Appalachian Lab for Occupational Safety and Health.

(2) "B' reader" is defined in KRS 342.794(3) which includes current certification with NIOSH or ALOSH.

(3) "Coal workers' pneumoconiosis" means a coal-related occupational pneumoconiosis which:

(a) Results from an accumulation of carbon and silica in the lungs from the inhalation of coal dust in the severance and processing of coal; and

(b) Is also known as anthracosilicosis or black lung.

(4) "Consensus" is defined in KRS 342.316(3)(b)4f.

(5) "Director" means the Director of the Division of Workers' Compensation Funds.

(6) "Executive Director" means the executive director of the Office of Workers' Claims.

(7) "ILO" means International Labor Organization.

(8) ~~(7)~~ "NIOSH" means National Institute of Occupational Safety and Health.

Section 2. Application, Response, and Consensus Process. (1) To apply for resolution of a coal workers' pneumoconiosis claim pursuant to KRS 342.732, the applicant shall file Form 102-CWP with the following completed attachments:

(a) ILO form completed by a "B" reader;

(b) The original x-ray interpreted by the "B" reader whose report is attached to Form 102-CWP;

(c) Work History (Form 104) to include:

1. All past jobs performed on a full- or part-time basis within twenty (20) years preceding the date of last exposure; and

2. All jobs in which the plaintiff alleges exposure to coal dust;

(d) Medical History (Form 105) to include all physicians, chiropractors, osteopaths, psychiatrists, psychologists, hospitals or other medical facilities where the individual has been seen or admitted in the preceding fifteen (15) years and including beyond that date any physicians or hospitals regarding treatment for any pulmonary or respiratory condition;

(e) Medical Release (Form 106);

(f) If pulmonary dysfunction is alleged, a medical report from a physician, including spirometric tests performed and tracings; and

(g) Social Security Release Form (Form 115).

(2) Within forty-five (45) days of the receipt of notice that the claim has been assigned to an administrative law judge, the employer shall file the following:

(a) ILO form representing an interpretation of an x-ray by a "B" reader; and

(b) Original x-ray interpreted by the "B" reader.

(3) Within fifteen (15) days of the receipt of the defendant's x-ray interpretation and x-ray, the Executive Director [~~commissioner~~] shall issue a notice to the parties stating whether consensus has been reached.

(a) If there is consensus:

1. The Executive Director [~~commissioner~~] shall issue a scheduling order; and

2. The defendant shall have thirty (30) days from the notice of consensus to file its notice of claim acceptance or denial on a Form 111-OD.

(b) If consensus has not been reached, the Executive Director [~~commissioner~~] shall forward the x-rays consecutively to three (3) "B" readers licensed in the state of Kentucky.

(4) The Executive Director [~~commissioner~~] shall make a determination of consensus within fifteen (15) days of receiving the three (3) "B" reader reports.

(a) The Executive Director [~~commissioner~~] shall issue a notice of whether consensus is reached within fifteen (15) days of receiving "B" reader reports.

(b) Once a determination of whether consensus is met, a scheduling order shall be issued.

(c) Within thirty (30) days from the consensus notice issued by the Executive Director [~~commissioner~~], the defendant shall file its notice of claim acceptance or denial on Form 111-OD.

(5) Upon the Executive Director's [~~commissioner's~~] notification of completion of the consensus process, the plaintiff shall have thirty (30) days in which:

(a) To amend the claim to allege pulmonary impairment; and

(b) To submit a medical report supporting that allegation and pulmonary function tests.

(6) If pulmonary impairment is alleged as a part of the application for adjustment of a coal workers' pneumoconiosis claim or upon amendment of the claim:

(a) The defendant shall have the right to a pulmonary examination by a physician of its own choosing; and

(b) The examination shall not be conducted until completion of the consensus process.

(7) Within thirty (30) days of notice that consensus has been reached by the Executive Director [~~commissioner~~], a party may challenge consensus by written notification to the office [~~department~~] and opposing parties.

(8) At the benefit review conference or no later than ten (10) days prior to a scheduled hearing, whichever is later, a claimant who was age fifty-seven (57) or older as of the date of last exposure shall individually or through counsel inform the administrative law judge in writing of the desire to opt for a twenty-five (25) percent permanent partial disability award instead of retraining incentive benefits, if that award is appropriate under KRS 342.732.

(9) A miner who is otherwise eligible for a twenty-five (25) percent permanent partial disability pursuant to KRS 342.732 may exercise his one (1) time option to choose retraining incentive benefits instead of the permanent partial disability award by filing with the administrative law judge in writing his desire to do so prior to the finality of the administrative law judge's decision.

Section 3. Discovery and Evidence. (1) The parties may [~~shall not~~] submit one [~~any~~] additional x-ray reading of one of the original x-rays submitted by the parties as stated in Section 2 of this administrative regulation [~~readings except what is required by Section 2 of this administrative regulation~~].

(2) [~~The x-ray readings submitted by the plaintiff, defendant and, if applicable, the three (3) "B" readers shall be the only x-ray readings considered as evidence by the administrative law judge.~~

———(3) The three (3) "B" reader reports obtained by the office [~~department~~] shall be admitted into evidence without the necessity of a notice of filing by any party.

Section 4. Medical Reports in the Consensus Process. (1) Only x-ray reports from "B" readers shall be admissible into evidence.

(2) Medical reports submitted from the plaintiff or defendant shall include:

(a) A CV or medical qualifications index number for the physician; and

(b) A certification that the physician maintains current "B" reader status.

(3) If consensus is not reached initially with the reports of the physicians submitted by the plaintiff and defendant, the Executive Director ~~[commissioner]~~ shall:

(a) Send the x-rays consecutively to the three (3) "B" readers on a random basis; and

(b) Insure that the "B" readers selected did not provide an initial reading for the plaintiff or defendant.

(4) "B" readers selected by the Executive Director ~~[commissioner]~~ shall:

(a) Submit the report on the ILO form; and

(b) Return the completed report to the Office ~~[Department]~~ of Workers Claims with the x-rays within twenty (20) days of the date it was sent to the physician.

(5) If consensus is challenged by a party, the administrative law judge may allow timely cross-examination of a medical evaluator that participated in the consensus process at the expense of the moving party.

Section 5. (1) This section shall apply to consideration of the following:

(a) Claims with a last exposure date between December 12, 1996 and July 14, 2002; or

(b) Claims in which the last exposure was prior to December 12, 1996 but was subject to a university evaluation pursuant to KRS 342.315(2) and dismissed upon a finding that the miner did not prove the presence of coal workers' pneumoconiosis.

(2) Any party seeking reconsideration of a claim in accordance with the provisions of KRS 342.732 shall file a motion to reopen which may be on Form MTR-2.

(3) The motion to reopen shall be accompanied by the following:

(a) A current medical release Form 106 executed by the plaintiff;

(b) An affidavit which states:

1. The date of last exposure;

2. The claim is appropriate for consideration pursuant to the retroactive provisions of KRS 342.792;

3. The claim was not dismissed upon grounds other than failure to meet medical eligibility standards; and

4. If the last exposure was prior to December 12, 1996, the prior claim was dismissed upon a finding the miner did not prove the presence of coal workers' pneumoconiosis radiographically;

(c) If an award was granted under the provisions of KRS 342.732 in effect prior to July 15, 2002:

1. A statement of the amount awarded and benefits actually received; and

2. A copy of the previous award or, if settled, a copy of the Form 110 and any accompanying documents;

(d) An updated work history (Form 104); and

(e) An updated medical history (Form 105).

(4) If the requirements of subsections (1) and (3) of this section have not been met, an administrative law judge shall issue an order summarily dismissing the motion to reopen.

(5) If a motion to reopen is filed, and an administrative law judge determines that the requirements in subsections (1) and (3) of this section have been met, the Executive Director [~~commissioner~~] shall:

(a) Obtain the original x-ray or x-rays performed at the university medical schools pursuant to KRS 342.315 and provide it to three (3) "B" readers licensed in the state of Kentucky who have agreed to participate on the consensus "B" reader list; and

(b) Insure that a university "B" reader who offered an interpretation of the x-ray in the original claim is excluded from the consensus interpretations.

(6) Within fifteen (15) days of receipt of the three (3) "B" readers' reports, the Executive Director [~~commissioner~~] shall:

(a) Issue notice to the parties as to whether consensus has been reached; and

(b) Assign it to an administrative law judge for determination of whether a prima facie showing of entitlement to greater benefits has been made.

(7) If an administrative law judge finds a prima facie showing of entitlement to greater benefits, the Executive Director [~~commissioner~~] shall:

(a) Issue notice scheduling the matter for a prehearing conference; and

(b) Issue a scheduling order for the presentation of proof to the parties.

(8) Additional x-ray readings or pulmonary function studies shall not be submitted as evidence for consideration by the administrative law judge.

(9) If consensus has been reached, the parties shall have thirty (30) days to notify the office ~~[department]~~ and opposing parties of intent to challenge consensus.

(10) If the prior claim was settled, a statement contained in the agreement as to jurisdiction, coverage under KRS Chapter 342, liability of the employer, or nature and extent of disability shall not be considered by the administrative law judge as an admission against interest.

Section 6. Use of American Medical Association's "Guides to the Evaluation of Permanent Impairment" in Coal Workers' Pneumoconiosis Cases. (1) Predicted normal values for FVC and FEV1 shall be determined in accordance with the latest edition of the American Medical Association Guideline. Age shall be determined as of the date of the evaluation. Height shall be measured while the plaintiff stands in his stocking feet and shall be rounded to the nearest centimeter. If the plaintiff's height is an odd number of centimeters, the next highest even height in centimeters shall be used.

(2) Formulas established by the guidelines for predicted normal FVC and FEV1 shall be applied and predicted values computed.

Section 7. Request for Participation by the Kentucky Coal Workers' Pneumoconiosis Fund. (1) Following a final award or order approving settlement of a claim for coal workers' pneumoconiosis benefits pursuant to KRS 342.732, the employer shall file a written request for participation with the Kentucky Coal Workers' Pneumoconiosis Fund within thirty (30) days and shall serve copies of the request on all other parties.

(2) A written request for participation with the Kentucky Coal Workers' Pneumoconiosis Fund shall be in writing and include the following documents:

- (a) Plaintiff's application for resolution of claim;
- (b) Defendant's notice of resistance, notice of claim denial or acceptance, and any special answer;
- (c) All medical evidence upon which the award or settlement was based;
- (d) The notice of consensus issued by the Executive Director [~~commissioner~~], if rendered;
- (e) Final opinion or order of an administrative law judge determining liability for benefits or settlement agreement and order approving settlement agreement;
- (f) If an administrative law judge's award was appealed, the appellate opinions; and
- (g) If the request for participation includes retraining incentive benefits under KRS 342.732, a certification by the requesting party that the plaintiff meets the relevant statutory criteria.

(3) If the request for participation is based upon the settlement of a claim, the employer shall submit a Form 110-CWP settlement agreement that represents liability exclusively for coal workers' pneumoconiosis benefits, and does not include any sums for other claims which the plaintiff may have against the employer.

(4) In claims arising under KRS 342.792, if the employer fails to submit a request for participation within thirty (30) days of the final award or order approving settlement, the plaintiff or an administrative law judge may file a written request for participation with the Kentucky Coal Workers' Pneumoconiosis Fund within sixty (60) days of the final award or order approving settlement.

(5) Within thirty (30) days following receipt of a completed request for participation, the director of the Kentucky Coal Workers' Pneumoconiosis Fund shall notify the employer and all other parties of acceptance or denial of the request.

(6) A denial shall be in writing and based upon any of the following findings by the director:

(a) Failure to file a written request for participation within the time limits specified in this administrative regulation without good cause;

(b) The employer failed to defend the claim;

(c) The employer entered into a settlement agreement not supported by the medical evidence, or which includes sums for claims other than coal workers' pneumoconiosis or which was procured by fraud or mistake; or

(d) The award or settlement was for retraining incentive benefits and the request for participation did not include the training or education certification required by this administrative regulation.

(7) Denial of a request for participation may be appealed by any party to an administrative law judge within thirty (30) days following receipt of the denial.

(8) The administrative law judge shall:

(a) Determine if the denial was arbitrary, capricious, or in excess of the statutory authority of the director; and

(b) Not reexamine the weight assigned to evidence by an administrative law judge in an award.

(9) Except in claims under KRS 342.792, the employer shall promptly commence payment on all of the liability pursuant to the award or order and shall continue until the liability of the Kentucky Coal Workers' Pneumoconiosis Fund is established.

(a) This duty of prompt payment shall continue during pendency of an appeal from denial of a request for participation.

(b) In claims arising from KRS 342.792, the Kentucky Coal Workers' Pneumoconiosis Fund shall promptly commence payment upon its acceptance of the claim.

(10)(a) Except in claims under KRS 342.792, upon an appeal from the denial of a request for participation, if the Kentucky Coal Workers' Pneumoconiosis Fund does not prevail, it shall reimburse the employer for its proportionate share of the liability with interest accrued from the date of denial.

(b) In an appeal of a denial in a claim arising under KRS 342.792, in which the Kentucky Coal Workers' Pneumoconiosis Fund does not prevail, the fund shall commence payment pursuant to the opinion and award or order approving settlement with interest accrued from the date of the denial. All interest shall be paid at the rate established in KRS 342.040.

Section 8. Any procedures not specifically set forth in this administrative regulation shall be governed by the guidelines set forth in 803 KAR 25:010, Procedure for adjustments of claims.

Section 9. Incorporation by Reference. (1) The following material is incorporated by reference:

(a) Form 102-CWP, Application for Resolution of Coal Workers' Pneumoconiosis Claim (June 2005 [~~July 2002~~] Edition);

(b) Form 104, Plaintiff's Employment History (January 1, 1997 Edition);

(c) Form 105, Plaintiff's Chronological Medical History (January 1, 1997);

(d) Form 106, Medical Waiver and Consent (January 1, 1997);

(e) Form 115, Social Security Release (January 1, 1997 Edition);

(f) ILO Form;

(g) Form 111-OD, Notice of Claim Denial or Acceptance (January 1997 Edition);

(h) Form 110-CWP, Agreement As To Compensation and Order Approving Settlement (July 2002 Edition); and

(i) Form MTR-2, Motion to Reopen KRS 342.732 Benefits (July 2002, Edition).

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Office [~~Department~~] of Workers' Claims, Prevention Park, 657 To Be Announced Avenue, Frankfort, Kentucky 40601, Monday through Friday, 9 a.m. to 4.

William P. Emrick, Executive Director
Office of Workers' Claims

Date

A public hearing on this administrative regulation shall be held on October 21, 2005, at 10:00 a.m. (EST) at the offices of the Office of Workers' Claims, Prevention Park, 657 Chamberlin Avenue, Frankfort, Kentucky 40601. Individuals interested in being heard at this hearing shall notify this agency in writing by October 14, 2005, five workdays prior to the hearing, of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be cancelled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to be heard at the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted until October 31, 2005. Send written notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

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